UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., Case No. 08-13555 (SCC)

Debtor.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

March 21, 2017

10:04 AM

B E F O R E :

HON SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

Hearing re: Doc #54675 Motion pursuant to the Amended SPV ADR Order and Section 105(a) of the Bankruptcy Code to (I) Enforce settlement and release agreement and (II) Grant attorneys and mediators fees and costs

Transcribed by: Jamie Gallagher

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorney for Lehman Brothers Holdings Inc. and Affiliates
201 Redwood Shores Parkway
Redwood Shores, CA 94065

BY: CHRISTOPHER COX, ESQ.

WEIL, GOTSHAL & MANGES LLP
Attorney for Lehman Brothers Holdings Inc. and Affiliates
767 Fifth Avenue
New York, NY 10153

BY: JACQUELINE MARCUS, ESQ.

K&L GATES
Attorneys for Shinhan
599 Lexington Avenue
New York, NY 10022

BY: JOHN A. BICKS, ESQ.
PRIYA CHADHA, ESQ.

K&L GATES

Attorney for Shinhan

1601 K Street, NW

Washington, DC 20006

BY: BRIAN KOOSED, ESQ.

P R O C E E D I N G S

THE COURT: Please have a seat. How's everyone today? So I take it you haven't settled, no?

(Chorus of no)

MS. MARCUS: Good morning, Your Honor. Jacqueline Marcus, Weil, Gotshal & Manges on behalf of Lehman Brothers Holdings Inc. and its affiliated debtors.

This is -- we're here this morning for the 106th omnibus hearing and most of the matters are not going forward today. Four of them have been adjourned, two have been withdrawn. And what we're going forward with is the motion pursuant to the amended SPV ADR order in Section 105(a) of the Bankruptcy Court to enforce the settlement agreement with Shinhan Bank. Your Honor, that will be handled by my partner, Chris Cox.

I just wanted to mention that there is one housekeeping matter --

THE COURT: Okay.

MS. MARCUS: -- that I'd like to address when we're done.

THE COURT: Okay, certainly.

MS. MARCUS: Thank you.

THE COURT: All right, so I'm well familiar with this dispute and I've read the papers a number of times. So I'm happy to hear you if there's anything you'd like to add, but

certainly you don't have to review what's in the papers. So I'll leave it to you.

MR. COX: Your Honor, if I could just briefly --

THE COURT: Sure.

MR. COX: -- address it. And you have 60 pages of briefing, so I have no intention of going through all of the briefs again. And I just wanted to highlight just a couple of points I think are there because what we really have here is two ships passing in the night, right? So --

THE COURT: Right.

MR. COX: I just wanted to reinforce a few things, right? Which is one which came out of our last meeting, right, which is this release agreement doesn't say it's a settlement and release. It says it's a release. And nowhere was there a negotiation that we were going to put the word settlement in there. And that's key when you look at Shinhan's cases because all the cases they cite were for settlement agreements and settlement release agreements. And I think that's just a very important point here because as you could tell from our briefing, we look at the settlement and the releases separate. And the release is just a functional thing about the timing and of the dismissals and releases. And what we had here was a release where there was never a negotiation that it was also going to be reducing the settlement to writing.

And I think if you look at that, it's really

dispositive of the issue because the settlement that was reached on April 20th was very simple. It just said Shinhan pays X --

THE COURT: Pay money, get released.

MR. COX: And you both provide general releases, you know, so we're done. And I don't think we really need to kind of get into that much more, but importantly, I wanted to address this moral hazard issue. Without getting into the release agreement and the language, because we've briefed on that, I'm happy to discuss anything you want to discuss. But here what we have is a situation where there was full briefing on the B of A motion.

THE COURT: I never thought I knew that.

MR. COX: And everybody knew it. The briefing had been submitted. The matter had been submitted. And both parties reached a compromise based on the risk of what Your Honor was going to do at that moment.

THE COURT: At any minute, right.

MR. COX: And what we had was a situation where Shinhan is basically arguing -- they gave themselves a unilateral option, right? Which is you get all of these papers together for us, Lehman. You sign two agreements that you're bound by your compromised settlement. And we're going to give ourselves a unilateral option and we're going to sit on it. And if the order is in favor of us, we're going to rip it up.

If it's not in favor of us, we get a settlement on very good terms. And whether that was intentional or not and I'm not accusing them of doing anything. We haven't done any discovery. But whether it was intentional or not, it still places Lehman in a position where they can't win, right? And that can't be what the party's bargain was. It had to be something else.

And what the bargain was was we reached a compromise settlement based on all of the factors at the time. It stipulated -- everything was agreed to, right? So whether you're looking at the first Winston factor where there was no reservation of rights to -- that things need to be reduced in writing, or the third Winston factor where everything was in place, I think under any term we have a binding settlement here. And with regard to the 2104 motion -- well, the argument that you don't have a signed writing without a signature from the lawyers, I think we addressed that fairly well that we have these signed e-mail exchanges where they had the authority to bind the companies. And so I think we meet that, whether or not it applies in Federal Court.

And the last point I'd make, Your Honor, is that you do have equitable power to order any attorney's fees and sanctions. And we did not get greedy in asking for sanctions. All we ask for were the additional attorney's fees and mediator fees from the time we reached the settlement and they said that

they're not going to sign it. So I'm happy to answer any questions Your Honor might have, but otherwise I'll submit.

THE COURT: Okay. Well, if it doesn't end after today or at some point, there could be additional fees that are incurred if there's going to be an appeal. The Bank of America action is now up on appeal itself, which is neither here nor there, but --

MR. COX: But yes, I think, unless the parties settle, there's going to be more fees and costs going forward with an appeal on. So we think that it's only fair to put us in a position where we're back on equal footing when we were when we thought we were getting paid our settlement.

THE COURT: Okay, thank you.

MR. COX: All right. Thank you, Your Honor.

MR. BICKS: Good morning, Your Honor.

THE COURT: Good morning.

MR. BICKS: I'll do my very best to be brief. I'm pretty sure --

THE COURT: Okay.

MR. BICKS: -- I will not be as brief as Chris. I do have a couple of --

THE COURT: But I did read everything.

MR. BICKS: I appreciate that.

THE COURT: Many times.

MR. BICKS: I believe it, absolutely, Your Honor.

THE COURT: Okay.

MR. BICKS: So Chris has said an interesting thing, he said the release agreement is a separate thing. I'm not really sure what that means, but I guess the way I see it, and if you look at the proposed order that Lehman has handed you, they're asking you to do two things. They're asking you to enforce what they're calling a settlement that they say occurred on April 20th. And separately, they're asking you to enforce a release agreement that never got signed about a month later.

The problem is here, there really isn't a path down the middle here. In order for you, respectfully, to rule in Lehman's favor on this matter, I think you have to do one of two things, but not both of two things. You either have to decide that there was enough that had been agreed to on April 20th --

THE COURT: Yeah, there was an agreement. There was a settlement. There's going to be a payment of money. And there's going to be a release.

MR. BICKS: See, the problem --

THE COURT: Period.

MR. BICKS: The problem with that, Your Honor, is it is absolutely clear that there were a lot of essential terms that forget about not having been agreed to --

THE COURT: No, there weren't. There were -- it is

the simplest settlement that there could possibly be. Pay money. Get released.

MR. BICKS: So, so --

THE COURT: There's not a lot of moving parts here.

MR. BICKS: But let me ask you about one. Pay money. When? Five years from now? Two days from now? Ten years from now? The parties had absolutely no agreement because we had never even talked about when money would be paid. And I won't regale you with them.

THE COURT: Could we just be forthcoming here?

MR. BICKS: Please.

THE COURT: Okay. There was a settlement. And then, incredibly, against all odds, the B of A ruling was issued right at the moment of truth. That's what happened. It's not about anything else but that. So I appreciate that many arguments have been constructed to get around that unfortunate fact, but it's a fact.

MR. BICKS: Your Honor --

THE COURT: Okay, so --

MR. BICKS: Obviously, we respectfully disagree that there was a settlement because, in fact, a lot of terms were missing. But if you've concluded that there was, let me ask you this question, please.

THE COURT: You don't get to ask me questions, okay?

MR. BICKS: You're right, I don't. But I would ask

this question to Lehman. If you believe that there was a settlement, why did you then draft a settlement agreement, send it to us, which contained a merger clause? Why would you do that? Why would they do that? The reason they did that is simple, because their understanding was precisely the same as ours. That we had agreed to one thing and one thing only on April 20th. And that was in the context of an overall settlement, how much our client would pay to Lehman to be done with this. They understood, just as we did, that this would ultimately be wrapped up in a proper settlement agreement. How does Lehman know this? Because they've settled about 200 of these cases. How do we know this? Because we have settled cases, these same cases with them. So we knew, just as they knew, that this would all be subject to a proper settlement agreement. And the fact that the agreement that they sent us, we didn't write it. They sent us the draft. The fact that the draft they sent us contains a merger clause, contains provisions that says it's not effective until it's signed, those completely fly in the face on this argument that they're trying to make now that what you ought to do is take a little from this one and a little from that one. You know, that's --

THE COURT: A little from what one? A little from what one?

MR. BICKS: A little from this supposed settlement on April 20th --

THE COURT: There were -- there was money to be paid and there was a release. And Judge Mabey said there's a settlement and everybody agreed.

MR. BICKS: And --

THE COURT: Super simple.

MR. BICKS: Super simple if you're willing to disregard the fact that material pieces of that settlement were gone. And if you are willing to disregard the fact that what Winston said over 30 years ago, which is as good law as it is -- then as it is now. Winston says you look at the intent of the parties to decide when they intend to be bound. What did these parties put in the draft agreement that was prepared by Lehman, negotiated through a couple of rounds? What did these parties put in the agreement was real simple. They put in the agreement that we intended to be bound when everyone signed.

And I want to talk just a little bit about this whole -- you know, this moral hazard concept. I mean, in a way I'm flattered. Are they saying that we knew more than they did?

THE COURT: No, they're simply saying that as the delay occurred, which according to the uncontested record that's before me, I'm not deciding any disputed facts, the delay was solely on Shinhan part for what appeared to be internal administrative reasons, giving Shinhan every benefit of the doubt, okay? Somebody was out of town. They wanted multiple copies. All kinds of stuff that had -- that are not

substantive and that are not material. But Shinhan wanted them. That's fine. And then the only thing that changed was the B of A decision came down. And then, all of a sudden, Shinhan was reevaluating the settlement because it decided that it felt that it didn't want to go through with it because, understandably, at the level of human nature, a decision comes down that would have let them off the hook. It's no more complicated than that.

So our argument has now been advanced as to why that settlement, that until that moment was a good settlement, is no longer a good settlement. So I will apply the Winston factors and I will tell you what my conclusion is. And you'll all take it from there.

MR. BICKS: All right. I appreciate that. Just to be super clear, we don't at this point qualify anything as being a good settlement or a bad settlement. What I've said to Mr. Cox all --

THE COURT: But that's disingenuous. The B of A decision, and I literally do not know where in the constellation of those defendants Shinhan falls because it's irrelevant to the narrow issue that's before me. But generally speaking, the B of A ruling was a sweeping ruling against Lehman and in favor of the defendants. Okay, I would add parenthetically that I would cite that as Exhibit A in the category of Lehman doesn't always win when they walk through

this door. Okay? That's got nothing to do with it.

But -- so good or bad, Shinhan then was faced with if we hadn't settled, we would not have to pay anything and now because we "settled", we have to pay money. Paying money is worse than not paying money if you're the party paying money. It's just simple.

MR. BICKS: All right. I was making a slightly different point. At this point, the position that the client takes in the litigation has nothing to do with the clients looking either backwards or forwards and saying this is a good settlement or it's a bad settlement. Our position all along has been it either is a settlement or it is not. It is --

THE COURT: And what -- and just hypothetically, even though it's not an issue now, what caused Shinhan to change its mind?

MR. BICKS: Maybe it's the same thing that caused Mr. Kasmarsick (ph) to change his mind. The reality is, and Winston recognizes this in the cases that we cited in our brief, if all that happened was somebody woke up one morning before they signed the agreement, the instant before they signed that agreement that says it's not effective until you sign it, then the answer is, actually they can change their mind. They can change their mind, because that's the agreement that the parties negotiated. That's the agreement that Lehman prepared for us.

I want to address the moral hazard piece because there -- certainly Mr. Cox is aware, his client is aware that at the exact same time that we are supposedly engaging in this foot dragging to hold off on signing this agreement, we are literally --

THE COURT: Let's not characterize it as foot dragging. Let's characterize it factually accurately, which is that there was -- there were weeks and weeks of delay occasioned solely by Shinhan and at Shinhan's request. Do you agree with that?

MR. BICKS: I do.

THE COURT: Okay.

MR. BICKS: And during --

THE COURT: So --

MR. BICKS: And during those weeks and weeks of delay, occasioned principally, if not solely, by the requests of our client, all of which were honored and in very good humor by the folks at Lehman, who we appreciate. During that same period of time, we were in the process of consummating settlements which were funded -- signed and funded, literally within the same period of time between April 20th and when your decision comes down. We were consummating settlements for other clients. That's -- to me --

THE COURT: Who's the we? I don't know what you're talking about.

MR. BICKS: K&L Gates on behalf of other defendants in these actions.

THE COURT: What does that have to do with anything?

MR. BICKS: To me, Your Honor, what it has to do with is if the suggestion is that we were trying to outsmart Lehman on behalf of one client, why wouldn't we have done it for others?

THE COURT: I want to make it perfectly clear, because I feel that a record is being created here that someone might want to use on appeal that indicates that I'm finding facts that are somehow in dispute. All of what you just said is completely irrelevant to my decision making process. So you may not be doing this, but I'm feeling strongly that you are trying to engage me in a discussion that will appear as if somehow I decided disputed facts. There are none. There is a simple timeline. It's set forth in the papers. That's the basis for the ruling on a straightforward application of those undisputed facts to and under the Winston factors. Period. So I'm not going to respond to that statement. I have no idea why it's relevant.

MR. BICKS: And just to be clear, that is not my intention at all. The very last argument that was advanced in papers by Lehman, the last argument in their last pleading, distilled down to its essence is that we were trying to gain the outcome here. That's their argument. All I'm doing is

responding and noting that if we were going to try to game the outcome, why when they called us on the morning that you issued your ruling, there's a fact -- undisputed fact that's in the record, when they called us at 10:30 that morning and said, "Are we done? Are we done?" I don't know what they knew when they called us, because we didn't take any discovery. I don't know what they knew. I know what we knew. We didn't know anything. Maybe they knew exactly what we knew, which was nothing.

THE COURT: Again, you -- again, I'm not going to engage on this topic because it's irrelevant, unless somebody makes it relevant. So if what you're telling me now is that you believe -- I don't remember what moment the decision was issued. I don't know who called whom when. Irrelevant.

MR. BICKS: Well, the folks at this table seem to think it's quite relevant. They made it the last argument in their reply brief. That was the only reason I make the point. I think I'm just about done, Your Honor. I would ask that you do look, though, in particular at one -- just one -- literally one sentence of the reply brief. There is a sort of a stunning sentence in the reply brief in paragraph 19 which says the release agreement does not set forth the terms and conditions of the settlement. That's in paragraph 19 of the Lehman reply brief.

I guess I would challenge Lehman to identify a single

term of the settlement that is not in the release agreement. And the answer is, they won't be able to because you can look at the release agreement. That's in the record as well. And I promise you that what you will see when you look at the release agreement, there is not one single term that would relate to what Lehman calls the settlement that is not in that document. And that's a significant -- this is a sort of a significant whiff because, again, what this is is Lehman trying to ask you to take a course down the middle between enforcing what they say was in the agreement made on April 20th, which they know really isn't an agreement because it's missing too many pieces, and asking you to enforce a negotiated agreement that has one fatal flaw, which is that it was never signed.

So they realize -- that on the law, they realize they've got an issue over here. They've got an issue over here. They're asking you to take a path down the middle, sort of mash them together. You know, it works for making meatloaf, but it's not great for, you know, legal analysis.

THE COURT: It's super simple. If the settlement agreement is upheld, there's going to be a payment of money and there are going to be releases. That's it.

MR. BICKS: And when are we to pay? I don't mean to ask you that question, but I'll restate it. If you believe that there was an agreement on April 20th, it is -- it's inconceivable that that term -- that term was never discussed.

There's absolutely nothing in the record. They know it was never discussed. There's nothing in Judge Mabey's (ph) correspondences to suggest that it was discussed. What more material term could there be than that.

And I point you to our brief. I won't cite the cases, obviously, but in our brief at pages -- on page 36, paragraphs 10 and 11, we go through the --

THE COURT: So the whole thing was illusory? This is a complete waste of everyone's time. A waste of Judge Mabey's time. And when Judge Mabey, after all that he did, said the parties have agreed to a settlement, that that's not meaningful?

MR. BICKS: No, it's the risk that when they drafted an agreement and sent it to us that says this is binding as soon as we sign it, that if we never signed it, it never became binding.

THE COURT: Okay, thank you.

MR. BICKS: Thank you.

THE COURT: Any response, Mr. Cox?

MR. COX: No, Your Honor, unless you want me to address any particular --

THE COURT: Do you want to address the point about so you sign it and when -- do they actually pay the money?

MR. COX: Yes, Your Honor. First of all, Your Honor can certainly issue an order that orders them to pay the money

whenever is appropriate.

THE COURT: But counsel's point is that because the agreement, or Judge Mabey's e-mail, or anything else for that matter did not specify the date on which the payment would be made, that that's somehow fatal to the vitality or the enforceability of the settlement.

MR. COX: I don't think so, Your Honor. It's -- first of all, it's the nuts and bolts of the timing of the releases. It's not the actual settlement. And if you look at paragraph 39 of our opening brief and at paragraph 9, I think we repeat a lot of the same cases in our reply brief, where the Court is enforcing an oral agreement to settlement. Because as Your Honor pointed out very clearly, the settlement where -- we have an ADR order where the parties are supposed to have authority to bind the clients. And once you see the settlement -- we hereby accept the settlement, you have a settlement. Whether you need to implement it with some language or something is irrelevant to the fact that we had a binding settlement at the time.

And also, I pointed it out in our brief, but also too the effectiveness of the release, you know, that Section 5, what it says is the releases are effective upon signature and payment, which is how releases work, right? You don't release somebody until the payment is made. But here, if you notice in the briefing, payment gets taken out in the first reference in

Shinhan's opposition and then it's never part of the bolded section of that. And I think they're trying to run away from that. And the fact of the matter is, is the release agreement reads like a release agreement, which is okay, the release is going to be effective a certain number of days after payment. That is ministerial, right, because all it is is implementing the settlement reached by Judge Mabey on April 20th.

And one thing I'd also point out is this merger agreement argument is -- the agreement -- the release agreement wasn't signed. So Shinhan wants to take advantage of the terms of the agreement as if it's been signed, but it wasn't. So we had the settlement. And so you can't have it both ways.

THE COURT: Right. And there's always an implied covenant of good faith and fair dealing, right?

MR. COX: Absolutely.

THE COURT: Okay. Thank you.

MR. COX: Thank you, Your Honor.

THE COURT: All right. Thank you very much. I'm going to give you -- the way this will work is I'm going to read something. It will probably take me about 10 or 15 minutes to read it. You can get a transcript when it's ready. I'll ask you to prepare an order and you can in the order refer to the transcript and/or attach it and that will provide you a basis for any subsequent action that you wish to take. All right.

Before the Court is Lehman Brothers Special Finance Inc.'s, LBSF's motion pursuant to the amended SPV ADR order and section 105(a) of the Bankruptcy Code to: 1) enforce settlement and release agreement; and 2) grant attorney's fees and mediator's fees and costs. The motion. Shinhan opposes the motion.

Background. The facts relevant to the narrow issue before the Court as undisputed, as evidenced by the joint stipulation of facts signed by the parties on January 27th, 2017, and subsequently entered by the Court. On September 14th, 2010, LBSF initiated an adversary proceeding captioned LBSF v. Bank of American National Association, et al., case number 10-03547 against some 250 defendant noteholders, note issuers, and indentured trustees seeking inter alia to recover approximately $1 billion that was distributed to the defendant noteholders following the commencement of the Lehman Brothers' Chapter 11 proceedings in September 2008.

The action is colloquially known as the distributed action. Shinhan is one of the defendants named in the distributed action. Shinhan denied that it had any liability to Lehman in the distributed action. In April 2016, while fully briefed dispositive motions in the distributed action were sub judice in this Court, LBS and Shinhan engaged in mediation discussions pursuant to the amended SBV ADR order. The Honorable Ralph Mabey served as mediator.

At the conclusion of the mediation, Judge Mabey proposed that the parties settle the matter by paying LBSF a certain amount, the settlement amount. On or about April 20th, 2016, both LBSF and Shinhan accepted Judge Mabey's proposal as to the settlement amount and Judge Mabey asked LBSF to provide settlement documentation to Shinhan.

The next day, LBSF sent a draft release agreement, the release agreement, to Shinhan's counsel for review and comment. Shinhan proposed certain changes to the release agreement, which LBSF subsequently accepted. Specifically, on May 11th, 2016, Shinhan revised Section 4 of the release agreement to require that the parties execute hard copies as opposed to electronic copies and in accordance with that change, revised the date of the release agreement to be dated as of the date Shinhan executed its respective hard copies.

Shinhan's counsel later requested that LBSF: 1. Send Shinhan two original signed copies of the release agreement; and 2. Provide documents establishing Lehman's signatory authority to sign the release agreement.

On May 27th, 2016, LBSF advised Shinhan's counsel that LBSF had sent the requested materials to Shinhan. On June 17th, 2016, Shinhan's counsel notified LBSF that Shinhan was unable to complete its internal approval process because certain staff members were out of the office and that signature and payment would most likely occur the week of June 27th,

2016.

On the morning of June 28th, 2016, Shinhan's counsel confirmed by e-mail that Shinhan had completed its internal approval process and that the release agreement would be signed by June 30th, 2016. Several hours after such e-mail was sent, this Court issued its decision in the distributed action, dismissing LBSF's claims against, among others, Shinhan. Two days after the Bank of America decision was rendered, Shinhan's counsel advised LBSF that it had not signed the release agreement and was still "evaluating" the Bank of America decision.

LBSF replied that it did not believe that the Bank of America decision affected the parties' settlement agreement and that Shinhan should transfer the settlement amount to LBSF. The parties returned to Judge Mabey to attempt to resolve the dispute, but were unable to reach a consensual resolution. As a result, the parties have now sought the Court's intervention in this matter.

As described in the motion, LBSF asserts that the parties had a binding and enforceable settlement agreement as of April 20th, 2016, when the parties accepted Judge Mabey's settlement proposal. LBSF urges the Court to treat the April 20th settlement as final, binding, and enforceable, despite the fact that Shinhan never signed the release agreement.

Shinhan, on the other hand, contends that the parties

did not enter into an enforceable settlement on April 20th, 2016, and that certain provisions in the release agreement preclude a finding that the release agreement is an enforceable agreement in the absence of Shinhan's signature. For the reasons that follow, the Court finds in favor of LBSF.

II. Discussion. A. Applicable law.

The Second Circuit has held that in deciding whether an unexecuted settlement agreement -- unexecuted agreement is binding and enforceable, Courts must examine four factors: 1. Whether there has been an express reservation of the right not to be bound in the absence of a writing; 2. Whether there has been partial performance of the contract; 3. Whether all of the terms of the alleged contract have been agreed upon; and 4. Whether the agreement at issue is the type of contract that is usually committed to writing. Winston v. Mediafire Entertainment Corporation, 777 F.2d 78 at 80 (Second Circuit, 1985).

No single factor is dispositive and the circumstances may be shown by oral testimony, correspondence, or other preliminary or partially complete writings. Id at 81.

Under the first Winston factor, the Court must consider whether there was an express of the right not to be bound in the absence of a writing. When the parties accepted Judge Mabey's settlement proposal on April 20th, 2016, neither party reserved the right to be bound by such settlement, only

upon signature of an agreement. Moreover, nothing in the correspondence between the parties suggests that Shinhan reserved the right to be bound to the April 20th, 2016 settlement only upon signature of an agreement.

Following the parties acceptance of Judge Mabey's settlement proposal, counsel for Shinhan repeatedly stated that the parties reached an agreement on the terms of the release agreement and that it would remit payment once its internal approval process was complete. For example, after LBSF sent Shinhan two executed copies of the release agreement, Shinhan's counsel responded that, "Shinhan is trying to get everything signed up and payment remitted by the end of this week." Two weeks later, Shinhan's counsel wrote to LBSF that, "Shinhan just confirmed that they have completed their internal approval process and the settlement agreement will be signed by Thursday, June 30th." At no point before the Bank of America decision was issued did Shinhan express an intent not to sign the release agreement. In fact, the aforementioned correspondence with LBSF reveals precisely the opposite.

Although Shinhan points to Sections 4 and 5 of the release agreement, both of which state that the release agreement will become effective upon execution by both parties, Shinhan's reliance on such language is misplaced. This language simply means that LBSF's release automatically becomes effective upon execution and payment, not that the April 20th,

2016 settlement itself will become effective upon signing the release agreement and paying the settlement amount.

Moreover, although Shinhan contends that certain provisions in the release agreement manifests an implied intent not to be bound, the correspondence between April 20th, 2016 and the day the Bank of America decision was issued undercuts that argument because during this time, Shinhan repeatedly assured LBSF that it intended to sign the release agreement.

As LBSF correctly points out, the real issue in this dispute is not the enforceability of the April 20th, 2016 settlement, but instead whether Shinhan can renege from the April 20th settlement, purportedly because it did not sign a document entitled "release agreement."

Only after this Court issued the Bank of America decision did Shinhan, for the first time, communicate that it was still evaluating its agreement with LBSF. The intent manifest here is not the intent not to be bound absent a signed writing. Rather it is a change of heart and strategy following this Court's Bank of America decision.

The first Winston factor weighs in favor of enforcing the April 20th settlement and the release agreement. Under the second Winston factor, the Court must consider whether there has been partial performance of the contract. There is no dispute that LBSF has not released Shinhan or dismissed Shinhan from the adversary proceeding. There was also no dispute that

Shinhan has not remitted the settlement amount or released LBSF. These are basic elements of consideration that would have been due under the release agreement. It is undisputed that they have not been exchanged.

Although LBSF states that its execution of the release agreement constitutes partial performance, the Second Circuit rejected such an argument in Winston, finding that there was no partial performance despite one side signing of the alleged agreements at issue. Because neither LBSF nor Shinhan has partially performed under the release agreement, the second Winston factor weighs against enforcing the April 20th settlement and the release agreement.

Under the third Winston factor, the Court must consider whether all of the terms of the alleged contract have been agreed upon. Judge Mabey confirmed in an e-mail on April 20th, 2016 that the parties agreed to settle the dispute through the payment of the settlement amount to LBSF "in full and complete settlement." At no point on or after April 20th did either party suggest that Judge Mabey mischaracterized or omitted material terms of the settlement that was reached on April 20th.

Moreover, based on the correspondence between the parties, it is evident that the parties agreed to the material terms of the release agreement and that there was nothing left to negotiate. In fact, neither party disputes that by the time

the Bank of America decision was issued, all material terms in the release agreement were agreed upon and the only remaining item was to obtain Shinhan's signature. As such, the third Winston factor weighs in favor of enforcing the April 20th settlement and the release agreement.

Under the fourth Winston factor, the Court must consider whether the agreement at issue is the type of contract that is usually committed to writing. While settlement agreements are generally reduced to writing, in this case there was, indeed, a complete, written release agreement. Its only missing element was Shinhan's signature. This weighs in favor of enforcing the April 20th settlement agreement, even absent Shinhan's signature on the release agreement.

By the time the Bank of America decision was issued, Shinhan had successfully completed its internal approval process and indicated that it intended to sign the release agreement on June 30th. Most notably, it was upon issuance of this Court's Bank of America decision directing dismissal of LBSF's claims against Shinhan that Shinhan communicated it was still evaluating its position. This undercuts not only the purpose of engaging in mediation, but also undermines the point of reducing a settlement to writing.

Strategic delay ought not to be able to be used to enhance one's position or to renege on an otherwise binding oral agreement. The Court finds that analysis of the fourth

Winston factor weighs in favor of enforcing the April 20th settlement and the release agreement. On balance, therefore, the Court finds that the first, third, and fourth Winston factors weigh in favor of enforcing the April 20th settlement and the release agreement.

Finally, the amended SPV ADR order provides for sanctions if a party has not complied with such order in good faith. Despite LBSF's request for sanctions in the form of attorney's fees and mediator fees, the Court finds that sanctions are not warranted in this case. It is clear that LBSF and Shinhan have dramatically divergent views regarding the enforceability of the settlement agreement between the parties. This circumstance, without more, does not justify imposing sanction on Shinhan for failing to remit the settlement amount. The undisputed evidence reflects that Shinhan -- that LBSF and Shinhan participated in the mediation process in accordance with the amended SPV ADR order. Shinhan's post Bank of America decision reevaluation of the release agreement does not, in this Court's view, rise to the level of sanctionable conduct. The Court therefore denies LBSF's request for sanction.

Accordingly, based on the pleadings submitted by the parties and upon the full record of today's hearing, the Court grants the motion -- the Court finds that the Winston factors on balance weigh in favor of finding that an enforceable

settlement exists between the parties, notwithstanding the fact that Shinhan did not sign the release agreement. The parties are directed to submit an order in accordance with this ruling.

All right?

(Chorus of thank you)

THE COURT: All right, so if I could please ask you to share a draft agreement among the parties and then send it to chambers with an indication that everybody signs off on the language, if not the substance, all right?

(Chorus of thank you)

MS. MARCUS: May I discuss the last issue?

THE COURT: Yes, Ms. Marcus.

MS. MARCUS: It's really a procedural matter, Your Honor --

THE COURT: Okay.

MS. MARCUS: -- that relates actually to the ADR order for --

THE COURT: Okay.

MS. MARCUS: -- affirmative claims on a derivatives contracts. As Your Honor I'm sure will recall, every month since September of 2009 when Judge Peck issued that order, a partner of Weil has been reporting to the Court on the number of settlements, the number of pending ADRs going forward. We're now at a point where the volume of remaining open ADR receivables is so small that we'd like to spare the estate the

expense of doing that monthly reporting. And what we suggest is that we'll do it semi-annually, so perhaps in June and December of each year. I don't know if we need to submit a revised order or how you'd like to handle that.

THE COURT: I'll leave that to you. I don't know if folks out in the world look forward to that report every month and might have a question if it doesn't appear, you could simply submit an order on notice of presentment that indicates the change.

MS. MARCUS: Okay. Thank you, Your Honor. We'll do that.

THE COURT: That sounds fine.

MS. MARCUS: And the first -- I guess we were due to file a report today, we're not going to do that if that's okay with Your Honor.

THE COURT: That's fine. It's a good thing that the numbers are getting smaller.

MS. MARCUS: Yes, I agree.

THE COURT: All right?

MS. MARCUS: Thank you, Your Honor.

THE COURT: Thank you. Okay. Thank you.

(Chorus of thank you)

(Whereupon, these proceedings were concluded at 10:43 a.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Jamie Gallagher, certify that the foregoing transcript is a true and accurate record of the proceedings.

Jamie Gallagher

Digitally signed by Jamie Gallagher
DN: cn=Jamie Gallagher, o, ou, email=digital1@veritext.com, c=US
Date: 2017.03.22 15:05:12 -04'00'

Jamie Gallagher

DATE: March 22, 2017

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501